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No. 89-

In The

Supreme Court of the United States

October Term, 1989

DENIS DOWD, Superintendent,
Farmington Correctional Center,

Petitioner,

vs.

DAVID CHITWOOD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether the Fourteenth Amendment's prohibition against deprivation of liberty without due process of law is violated by the State's Department of Corrections' enforcement of the language contained in the prisoner's judgment and sentence.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit affirming the judgment granting the petition for writ of habeas corpus is reported at 889 F.2d 781 (8th Cir. 1989) (App. 2). The Judgment and Order of the United States District Court for the Eastern District of Missouri granting the petition for writ of habeas corpus is unreported, but is published in the Appendix (App. 17, 18-20). The Report and Recommendation of the United States Magistrate is also unpublished, but it is provided in the Appendix (App. 21).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its Opinion on November 14, 1989 (App. 2). Petitioner's timely petition for rehearing was denied on December 29, 1989 (App. 1). Pursuant to 28 U.S.C. § 2201(c) and Supreme Court Rule 20, the present petition for writ of certiorari was required to be filed within ninety days of the denial of rehearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 2254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

2. Section 558.026.3, RSMo 1986, provides:

> A court may cause any sentence it imposes to run concurrently with a sentence an individual is serving or is to serve in another state. If the Missouri sentence is served in another state, subsection 4 of section 558.011 and section 217.690, RSMo, shall apply as if the individual were serving his sentence within the Division of Adult Institutions of the State of Missouri, except that a personal hearing before the Board of

> Probation and Parole shall not be required for parole consideration.

STATEMENT OF THE CASE

On August 2, 1982, respondent pled guilty to one count of second-degree forgery in the District Court for the Seventh Circuit of Oklahoma. He was sentenced to five years' imprisonment (App. 3). Ironically, respondent escaped from the custody of the Oklahoma Department of Corrections on Independence Day in 1983 (App. 3). Respondent fled to Missouri, where he committed Missouri crimes.

On January 10, 1984, respondent pled guilty in the Circuit Court of Barry County to one count of second-degree burglary. The court ordered respondent committed for seven years with the Missouri Department of Corrections.

> Wherefore, it is by the Court considered, ordered, adjudged and decreed that the said defendant shall be confined in the custody of the Department of Corrections of the State of Missouri in an institution or institutions designated by said department in accordance with law for a period of seven years to commence on the tenth day of January, 1984. . . .

[App. 46.] The circuit court also noted that the sentence was to run concurrently with the remainder of the Oklahoma sentence (App. 47).

On January 14, 1984, respondent pled guilty in the Circuit Court of Boone County, Missouri, to two counts of

forgery. That court sentenced him to two three-year concurrent terms of imprisonment, these sentences to be served consecutively to the Barry County and Oklahoma sentences (App. 51-54). Respondent was received by the Missouri Department of Corrections on January 13, 1984 (App. 3). Since that date, respondent has served and is serving only his Missouri sentences.

Respondent filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 on February 10, 1988, in the United States District Court for the Eastern District of Missouri (App. 32). Following pleadings, briefs and motions for summary judgment, Magistrate David Noce issued a Report and Recommendation that respondent be discharged from Missouri custody and transferred to the custody of the State of Oklahoma (App. 21). After timely objections to the Magistrate's Report and Recommendation, District Judge Clyde S. Cahill ordered respondent discharged from Missouri custody and transferred to the custody of the State of Oklahoma (App. 18-20). On June 14, 1989, judgment was entered upon the June 8, 1989 Order (App. 17). A timely notice of appeal ensued.

On November 14, 1989, the United States Court of Appeals for the Eighth Circuit issued its Opinion that affirmed in part and reversed in part the judgment of the district court (App. 2). The Court of Appeals found respondent's custody to violate the Due Process Clause of the Fourteenth Amendment; however, the court found the district court's remedy of discharge to be inappropriate (App. 14-15). Petitioner filed a timely petition for

rehearing that was denied on December 29, 1989. The present petition for writ of certiorari ensues.

ARGUMENT

Whether the Fourteenth Amendment's prohibition against deprivation of liberty without due process of law is violated by the State's Department of Corrections' enforcement of the language contained in the prisoner's judgment and sentence.

The United States Court of Appeals for the Eighth Circuit found respondent's custody unlawful because the Missouri Department of Corrections did not transfer respondent to the State of Oklahoma after respondent was received by the Missouri Department of Corrections (App. 12-14). The Court of Appeals found that respondent had a due process right to transfer based upon the Barry County judgment and sentence that ordered respondent's Barry County sentence to run concurrently with the remainder of respondent's Oklahoma sentence.[1] The Court of Appeals noted that the Barry County judgment did not expressly order respondent's transfer to the State of Oklahoma (App. 13). Rather, the court relied upon Missouri's statutory law, § 558.026.3, RSMo 1986, to find a Fourteenth Amendment interest in transfer (App. 13-14). Given the significance of the Court of Appeals' intrusion into this traditional area of the state's police

[1] Respondent's Oklahoma sentence was tolled due to his escape from custody on July 4, 1983. Oklahoma's sentence does not begin to run until the Oklahoma Department of Corrections receives respondent's custody for the purpose of completing the Oklahoma sentence.

power, this Court should exercise its discretionary review power under Supreme Court Rule 17.1.[2]

In our increasingly mobile society, the incidents of crime by one defendant in more than one state will necessarily increase. Likewise, as the federal government's jurisdiction expands, defendants sentenced by a state and by the federal government will also increase. The issue of whether sentences from two or more jurisdictions will run concurrently or successively is an issue of importance to all jurisdictions. Accordingly, this Court's review of the Court of Appeals' opinion is necessary to provide guidance about the role of the Fourteenth Amendment in this area.

This Court's review of the issue should result in a determination that the Court of Appeals had no jurisdiction to order respondent transferred. Congress has limited this federal court's habeas corpus jurisdiction to areas where a person is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). The Court of Appeals acknowledged that the Barry County judgment does not order the Missouri Department of Corrections to transfer respondent to the custody of the State of Oklahoma. To the contrary, the Barry County judgment orders respondent to the custody

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[2] Petitioner does not believe that there is a conflict between the circuits on this issue because no other court of appeals has been called upon to do what the Court of Appeals for the Eighth Circuit has done. Notwithstanding the lack of conflict, the analysis of the Court of Appeals creates "an important question of federal law which has not been, but should be, settled by this Court." Supreme Court Rule 17.1(c).

of the Missouri Department of Corrections for seven years (App. 46). Only the United States Court of Appeals for the Eighth Circuit could read that express language as implying that the Barry County Circuit Court really meant for the Missouri Department of Corrections to transfer respondent to a foreign jurisdiction.

The Court's scope of review of respondent's judgment papers, however, should be narrow. If respondent were held in custody without judgment papers, if the judgment had been reversed or vacated, if the sentence had expired or if a pardon had issued, then the prisoner is being denied liberty without due process of law. In these situations, the writ properly issues. *See generally,* Habeas Corpus, § 71, 39 Am.Jur. 230 (describing limited nature of writ when judgment issues).

The Court of Appeals did not find there were no judgment papers. In fact, the Court of Appeals found that respondent was incarcerated pursuant to the seven-year sentence from Barry County and the three-year sentence from Boone County (App. 3). This should end the limited federal-court review of judgment papers.

The United States Court of Appeals for the Eighth Circuit used to believe that it had such limited jurisdiction. In *Harkins v. Wyrick*, 589 F.2d 387 (8th Cir. 1979), the sentencing judge ordered that Harkins' sentence begin immediately even though he was not received by the Missouri Department of Corrections until two and one-half years after sentencing. Harkins filed suit in state court, requesting credit for the two and one-half years of federal custody be applied to completion of the Missouri sentence. The Missouri Supreme Court declined Harkins'

request and ruled that the language of the judgment providing that the sentence begin immediately was surplusage and unenforceable. *See, Harkins v. Lauf*, 532 S.W.2d 459, 461 (Mo. banc 1976). Ten days later, Harkins filed his petition in federal court. *Harkins v. Wyrick*, 589 F.2d 387, 389 (8th Cir. 1979). The court declined to grant relief because it viewed the judgment issue as one of state law. The court below offered no explanation for declining to follow this rule in *Harkins*.

No federally-protected constitutional right has been or is being violated by petitioner. Respondent pled guilty and was sentenced to seven years with the Missouri Department of Corrections by the Barry County Circuit Court. Respondent also has a consecutive three-year sentence from the Boone County Circuit Court. Petitioner is entitled to ten years' custody of respondent. Respondent has served less than seven years of this sentence. The judgment papers authorize custody for ten years. Respondent has not completed service of these sentences. Respondent's due process rights were not violated.

Since the judgment expressly requires custody in the Missouri Department of Corrections and does not express a requirement that respondent be transferred to the custody of the State of Oklahoma, the Court of Appeals had to infer such a requirement (App. 12-14). The Court of Appeals inferred a due process right to transfer to the State of Oklahoma from the Barry County Circuit Court's judgment's language that orders the Barry County sentence run concurrently with the remaining sentence from Oklahoma (App. 13). The Court of Appeals held that this result was required by Missouri statutory law (App. 13, *citing*, § 558.026.3, RSMo 1986). The Court of Appeals'

analysis, however, does not include the fact that the court has no power to grant relief based upon a putative violation of Missouri statutes. Section 2241(c)(3) does not provide the federal courts with power to cure perceived errors under state law. The Court of Appeals' attempt to do so well justifies this Court's use of its discretionary power to review.

The court's citation of *Hicks v. Oklahoma*, 447 U.S. 343 (1980) (App. 14), does not cure the error in the Court of Appeals' analysis. The Court of Appeals failed to find any element of a *Hicks* violation. *See, Dupuy v. Butler*, 837 F.2d 699, 703 (5th Cir. 1988) (discussing elements of a *Hicks* claim). To the contrary, applying *Hicks* to the facts of the present case, the Missouri Department of Corrections is entitled to respondent's custody for the full seven years of the Barry County sentence. The judgment further allows the Department of Corrections to designate any institution for the service of this sentence. The Barry County judgment does not create a due-process-protected expectation in the respondent that he would be transferred in January, 1984.

Even if the Court of Appeals had the statutory power to review Missouri law, the Court of Appeals' analysis of the statute is erroneous. There is a common-law presumption that sentences from different jurisdictions are to be served consecutively. "Sentences to penal institutions of different jurisdictions are cumulative and not concurrent." *State v. Smith*, 633 S.W.2d 253, 254 (Mo.App., S.D. 1982). This is also true in the federal system. *Moody v. Daggett*, 429 U.S. 78 (1976). Before August 13, 1982, there was no statutory authority for a court in Missouri to order that a sentence imposed by it run concurrently with

a sentence being served in another state. *State v. Tolliver*, 544 S.W.2d 565, 569 (Mo. banc 1976); *State v. Fincher*, 655 S.W.2d 54, 62-63 (Mo.App, W.D. 1983). This common-law presumption was modified by the Missouri Legislature's enactment of 558.026.3, RSMo 1986. That amendment provides Missouri trial courts with the discretion to impose Missouri sentences concurrently with sentences from foreign jurisdictions. *State v. Fincher*, 655 S.W.2d at 63 n. 1.

The Court of Appeals suggested that the Barry County Circuit Court had the authority to sentence respondent to a concurrent term (App. 12). The Missouri Department of Corrections has complied with that aspect of the judgment and statute. The Missouri Department of Corrections counts towards completion of the Missouri sentences the time respondent presently spends in custody. The State of Oklahoma has not begun its sentence on respondent because he has not been received by the Oklahoma Department of Corrections since respondent's 1983 escape. The Missouri Department of Corrections, however, does not have authority to order the Oklahoma Department of Corrections to begin its sentence. The Missouri Department of Corrections, however, has done nothing to prevent the Oklahoma Department of Corrections from beginning its sentence. The Missouri Department of Corrections has complied with the Barry County judgment and with Missouri's statutes.

The Court of Appeals found that the statute requires the Missouri Department of Corrections to transfer respondent to the State of Oklahoma. First, there is no express language in that statute to that effect. Second, that interpretation of the statute is inconsistent with the

Barry County judgment and sentence that requires respondent to be incarcerated with the Missouri Department of Corrections. Third, the Missouri Department of Corrections can comply with the statute without need to transfer respondent to Oklahoma. The Missouri Department of Corrections is counting respondent's time toward completion of the Missouri sentence. How Oklahoma counts its time is Oklahoma's business, not the business of the Missouri Department of Corrections or the Missouri federal courts.

This Court has determined that a prisoner has no justifiable expectation that he will be incarcerated in any particular state. *Olim v. Wakinekona*, 461 U.S. 238, 245 (1983). As mentioned earlier, there is no language in the judgment that respondent be transferred to the State of Oklahoma. If the judgment had such express language, that language would not be binding on the Missouri Department of Corrections and would be treated as surplusage. *See, Harkins v. Lauf*, 532 S.W.2d at 461; *see also*, 18 U.S.C. § 4082 (Attorney General designating prison facility notwithstanding recommendation of federal judge). If such express language would be surplusage, then such implicit language, as purported by the Court of Appeals (App. 12-14), should also be considered surplusage. A Missouri trial court has no authority to designate the location of confinement. That authority is exclusively vested with the executive branch – the Missouri Department of Corrections. *See*, § 217.350, RSMo 1986; *Nash v. Black*, 781 F.2d 665, 668 (8th Cir. 1986); *Boone v. Danforth*, 463 S.W.2d 825 (Mo. 1971).

Finally, the Court of Appeals does not discuss how the Missouri Department of Corrections was supposed to

transfer respondent in January, 1984. The only method by which to transfer a prisoner from Missouri to a sister state is by the Interstate Corrections Compact, § 217.525, RSMo 1986, *et seq.* The Missouri Legislature authorized only the Missouri Department of Corrections to engage in interstate transfers. Indeed, the Legislature authorized the Director of the Division of Adult Institutions to enter into compact contracts. Section 217.525, RSMo 1986. Under Article IV(A) of the Compact, only members of the Missouri Department of Corrections have power to order interstate transfer. The Barry County Circuit Court has no power to order interstate transfers. The Missouri Legislature did not provide that power to the Barry County Circuit Court.

The Court of Appeals implicitly disagreed. The Court of Appeals found that the Missouri Legislature conferred to the state circuit judges the power to order the Missouri Department of Corrections to transfer an inmate out of state (App. 12-14). This is an incorrect interpretation of Missouri law for several reasons. First, it is historically inaccurate. During the twentieth century, the Legislature has taken the discretion to select the place of custody from the sentencing court and placed it with the Missouri Department of Corrections. *Compare, State v. Walker*, 274 S.W. 56, 57 (Mo. 1925) (discussing statutory criteria for sentencing inmate to Boonville Reformatory), and *Anthony v. Kaiser*, 169 S.W.2d 47, 48-49 (Mo. banc 1943) (explaining effect of sentences to the Missouri Intermediate Reformatory and the State Penitentiary), with § 217.350, RSMo 1986, and § 217.525, RSMo 1986, *et seq.* Second, the panel stated that the statute's "face" indicates that the Legislature intended to broaden the circuit

court's power (App. 13). Section 558.026.3, RSMo 1986, provides:

> A court may cause any sentence it imposes to run concurrently with a sentence an individual is serving or is to serve in another state.

Nowhere on the statute's "face" is there an express or implied provision giving the state trial judge power to order transfer to another state or even to a particular institution within Missouri. In fact, under Missouri § 558.011.3(1), RSMo 1986, the state circuit judge has only the power to "commit the defendant to the custody of the Department of Corrections and Human Resources for the term imposed under § 557.036, RSMo, or until release under procedures established elsewhere by law." These statutes do not provide to the Missouri circuit judge the power to order transfer to any state.

It is improvident to imply such transfer power from the statutes unless the Legislature expressly provided such power. If the Legislature wanted trial judges to have that power, it could have said so as it did earlier this century. Additionally, the Court of Appeals' finding of such power assumes that the Legislature has the power to delegate. As the Court of Appeals learned, neither the Missouri Department of Corrections, the Missouri Legislature, the Missouri state courts nor the Missouri federal courts can order respondent transferred if Oklahoma declines to accept him (App. 15 n. 2). Nobody in Missouri, executive or judicial, state or federal, can order Oklahoma to accept respondent. The Legislature would not be so presumptuous as to believe it can delegate the power to order a sister state to accept a prisoner. Further, since the

Missouri state circuit judges are not parties to the Interstate Compact, it is difficult to believe that the Legislature would give them power under the Compact without expressly saying so. It would be poor social policy to interpret § 558.026, RSMo 1986, in the manner of the Court of Appeals. The Missouri Department of Corrections is best suited to determine the corrections needs of this State. The Department is best suited to determine if transfer is warranted under the Compact. The Department is best suited to determine to which state a prisoner should go. The Department best knows whether a prisoner will be accepted by a receiving state. The Department best knows whether a receiving state owes Missouri a "prisoner" or whether Missouri owes the receiving state a "prisoner." These items are not within the ambit of the Missouri state circuit judges' knowledge. Given the judges' lack of knowledge, it is doubtful if the Legislature wished to give judges power to order transfer.

Even if the Missouri Legislature granted the power to order interstate transfers to state circuit judges, there remains one problem: in this case – Oklahoma. Oklahoma has no obligation to accept respondent. The district court's order to transfer Chitwood to Oklahoma is unenforceable (App. 15 n. 2). Oklahoma can take or leave respondent as it pleases. If the federal judiciary cannot force Oklahoma to take respondent, how can the Barry County Circuit Court? Respondent had no legitimate due process expectation that his Oklahoma sentence would run concurrently with the Barry County Circuit Court sentence.

This Court may notice that many of the concepts contained in this petition for writ of certiorari concern

construction of Missouri state law and the social policies underlying that law. Instinctively, this Court may feel that such issues are not worthy of its certiorari review. Before making that decision, however, petitioner would note the following: The Court of Appeals stepped beyond the power given to it by Congress under 28 U.S.C. § 2241 when it ordered respondent transferred to the State of Oklahoma. The Court of Appeals found respondent's custody unlawful under Missouri statutory law. That usurpation of power from Congress is what petitioner primarily believes deserves this Court's review. The fact that the Court of Appeals erred in its review of Missouri law is secondary but symptomatic of a court's overstepping its jurisdiction. Certiorari review of the Court of Appeals' judgment is warranted.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-2113EM

David Chitwood, Appellee, vs. Denis Dowd, Superintendent, Farmington Correctional Center and William Webster, Missouri Attorney General, Appellants.	)	Order Denying Petition For Rehearing and Suggestion For Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the Court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

December 29, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-2113

David Chitwood, Appellee, v. Denis Dowd, Superintendent, Farmington Correctional Center and William Webster, Missouri Attorney General, Appellants.	*	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: August 29, 1989
Filed: November 14, 1989

Before JOHN R. GIBSON, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Denis Dowd, Superintendent of the Farmington Correctional Center, and William Webster, Missouri Attorney General, (collectively "Dowd") appeal from the district court's[1] judgment in favor of David Chitwood. The

[1] The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

district court granted Chitwood's habeas corpus petition, ordering Chitwood transferred to Oklahoma and unconditionally releasing him from serving any remaining time on his Missouri sentences. Dowd asserts on appeal that the district court erred in granting Chitwood habeas corpus relief because Chitwood failed to exhaust state remedies or present a federal constitutional claim. Dowd also challenges the district court's remedy. We affirm the judgment in part and reverse and remand in part.

On August 2, 1982, Chitwood pleaded guilty to one count of second-degree forgery in the District Court for the Seventh Judicial Circuit of Oklahoma. The court sentenced him to five years' imprisonment. Chitwood escaped from the Oklahoma Department of Corrections' custody on July 4, 1983, and fled to Missouri. On January 10, 1984, Chitwood pleaded guilty in the circuit court of Barry County, Missouri, to one count of second-degree burglary. The court sentenced Chitwood to seven years' custody with the Missouri Department of Corrections, beginning January 10, 1984. The court ordered that the sentence run concurrently with the remainder of Chitwood's Oklahoma sentence. The Missouri Department of Corrections received Chitwood on January 13, 1984.

On January 14, 1984, Chitwood pleaded guilty in the circuit court of Boone County, Missouri, to two counts of forgery. That court sentenced him to two three-year concurrent terms of imprisonment, consecutive to the Barry County and Oklahoma sentences.

During his incarceration, Chitwood made several inquiries to determine whether his Barry County and Oklahoma sentences were running concurrently. Beginning in

January 30, 1984, and continuing through March 20, 1986, Chitwood wrote to Missouri prison officials. Apparently Chitwood did not normally receive a reply. His first letter to Mr. Harry Lauf was returned to him with a note handwritten by Mr. Lauf at the bottom: "Find attached a copy of your judgment which only states [that your Barry County sentence] is to run concurrently with the remainer [sic] of your Oklahoma sentence." Letter from David Chitwood to Harry Lauf, Records Officer, Missouri State Penitentiary (January 30, 1984). A letter from the Missouri Department of Corrections dated October 20, 1986, referred Chitwood back to Mr. Lauf. Letter from Carol J. Wolkey, Interstate Compact Coordinator, Missouri Department of Corrections to David Chitwood (October 20, 1986).

On September 21, 1986, Chitwood wrote to the Oklahoma Department of Corrections, asking Oklahoma to contact Missouri, and make arrangements for Chitwood's transfer. In November 1986, the Oklahoma Department of Corrections let Missouri know of its willingness to receive Chitwood back into custody.

In May 1987, Chitwood wrote to the Missouri Board of Probation and Parole, the Governor of the State of Missouri, and the Boone County prosecutor's office. He also wrote to the director of the Missouri Department of Corrections, who responded that the Department of Corrections was authorized to hold Chitwood confined until the conditional release date of his Boone County sentence, set for May 13, 1990.

Chitwood filed a pro se state habeas corpus petition in the circuit court of Barry County, Missouri, on February 25, 1986. The circuit court dismissed the petition for improper venue. Chitwood then filed a pro se federal habeas corpus petition in the Western District of Missouri on January 23, 1987, alleging that the Barry County court did not have the authority to impose the sentence given him. The district court dismissed the petition for failure to exhaust state post-conviction remedies. On November 5, 1987, Chitwood filed a pro se state habeas corpus petition in the circuit court of St. Francois County, Missouri. The circuit court denied the petition on the ground that Chitwood's proper avenue of redress was a motion for post-conviction relief under Missouri Rule of Criminal Procedure 27.26 (since replaced by Rule 24.035).

On February 3, 1988, the Missouri Department of Corrections informed counsel then representing Chitwood that the Department had approved Chitwood for interstate placement in Oklahoma. Chitwood objected on the grounds that transfer so close to the May 13, 1988, conditional release date on his Barry County sentence would not prevent him from having to serve his Oklahoma sentence consecutively to his Barry County sentence. Chitwood wrote: "If this had been initiated when first I requested inter-state transfer in October 1986[,] I would have agreed to it at that time." Letter from David Chitwood to Vernon F. Heath, Central Transfer Authority (February 9, 1988). Chitwood stated his intention to seek a remedy through the courts to prevent him from having to serve a period of confinement beyond which the Barry County Circuit Court sentenced him. *Id.*

Chitwood wrote to the Missouri Public Defenders' Office in January 1988. He sought advice as to whether the conditional release date for his Barry County sentence, set for May 13, 1988, allowed enough time to pursue state remedies or whether he should file another federal habeas corpus petition. That office advised Chitwood to proceed with habeas corpus petitions in the Missouri appellate courts and federal district court, on the theory that the federal court could stay the habeas proceedings until the Missouri appellate courts ruled.

On February 10, 1988, Chitwood filed the instant pro se petition for writ of habeas corpus in the United States District Court for the Eastern District of Missouri. Chitwood and the Missouri Department of Corrections filed motions for summary judgment in April 1988. The court thereupon appointed counsel for Chitwood. In May 1988, the magistrate issued a Report and Recommendation finding petitioner entitled to habeas relief. After objections to the Report and Recommendation were filed by the parties, the district court, in a chambers conference on July 29, 1988, expressed its desire that counsel for both parties pursue all possible methods of informally resolving Chitwood's petition.

The court also directed Chitwood's counsel to meet with the Barry County sentencing judge. The judge confirmed his intent that the Missouri Department of Corrections transfer Chitwood to Oklahoma to serve his Barry County sentence. The prosecuting attorney involved in the Barry County sentencing also confirmed his understanding that Chitwood would serve the Oklahoma and Barry County sentences concurrently in Oklahoma.

Chitwood's counsel sought various solutions in Oklahoma. Counsel applied for inabsentia parole on Chitwood's Oklahoma sentence, which [parole] was denied. The Oklahoma Public Defenders' Office, which had represented Chitwood during the Oklahoma sentencing, was unable to assist him further. Counsel sought the assistance of the Oklahoma sentencing judge, who declined to modify the Oklahoma sentence. Counsel pursued the possibility of a Governor's commutation for Chitwood's Oklahoma sentence, but the Governor's office informed counsel that the Oklahoma Pardon and Parole Board had denied Chitwood's request for commutation for failure to meet the eligibility criteria.

On June 8, 1989, the district court granted Chitwood's motion for summary judgment and habeas corpus relief, ordering Chitwood transferred to the Oklahoma department of corrections within thirty days. The court unconditionally released Chitwood from serving any remaining time on either of his Missouri sentences. Dowd filed a notice of appeal and emergency motion for stay of execution of judgment. The district court denied the motion. We granted a temporary stay order and set the case for special hearing. On September 5, 1989, we lifted the stay order with respect to that portion of the district court's order which ordered Dowd to transfer Chitwood to the Oklahoma Department of Corrections.

I.

Dowd first challenges the district court's grant of habeas corpus relief to Chitwood on the ground that Chitwood failed to exhaust his available state remedies

and that the magistrate's finding of special circumstances, adopted by the district court, was erroneous. Dowd first asserts that Chitwood is procedurally barred from bringing his claim because he deliberately bypassed other remedies. Specifically, Dowd contends that Chitwood's habeas corpus petition actually states a claim under *Santobello v. New York*, 404 U.S. 257 (1972). Under *Santobello*, prosecutors must fulfill promises or agreements made during the plea bargaining process when those promises are part of the inducement or consideration for the defendant to accept the plea bargain. *Id.* at 262. Dowd evidently believes that Chitwood is actually asserting a breach of the plea agreement, in which the prosecution agreed to recommend that Chitwood serve his Barry County sentence and the remaining time on his Oklahoma sentence concurrently. Dowd asserts that Chitwood's claim properly falls under former Missouri Rule of Criminal Procedure 27.26 (now Rule 24.035), under which prisoners may challenge their sentence as imposed in violation of the Constitution and laws of the state or the United States or as otherwise subject to collateral attack.

Chitwood's petition does mention the misexecution of his Barry County sentence as effectively violating his plea agreement. Chitwood asserts, however, that he is not bringing a *Santobello* claim because he does not wish to withdraw his guilty plea, and he is satisfied with the court's sentence. Instead, Chitwood challenges the execution of the sentence.

Chitwood's position is supported by Missouri case law, which holds that the execution of properly imposed sentences is not cognizable under Rule 27.26. *Stout v. State*, 745 S.W.2d 237 (Mo. Ct. App. 1987). Chitwood[,]

perhaps inartfully[,] worded his pro se habeas corpus petition to raise the issue of his plea bargain. If so, this should not be used to deny him relief. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Sher v. Gilpin*, 738 S.W.2d 900, 901 (Mo. Ct. App. 1987). Moreover, the prosecution carried out the plea bargain by recommending that the court sentence Chitwood to serve his Barry County sentence concurrently with his Oklahoma sentence. In any event, Chitwood has explicitly clarified his position since filing his petition. We conclude, therefore, that Chitwood did not deliberately bypass any remedies that were available to him. Thus, there is no procedural bar to his habeas corpus petition.

We next consider Dowd's claim that Chitwood has not exhausted state remedies. Chitwood has twice presented his habeas corpus claim before the Missouri circuit courts. Chitwood has not, however, obtained any ruling on his petition from the Missouri appellate courts. There is no general right of appeal from a habeas corpus action in Missouri. *See Bebee v. State*, 619 S.W.2d 363 (Mo. Ct. App. 1981); *In re C.S.N.*, 685 S.W.2d 567 (Mo. Ct. App. 1984). Chitwood has not, however, presented successive habeas petitions to the Missouri appellate courts to obtain even the record of their denial. Therefore, the issue is whether or not Chitwood has fully exhausted available state court remedies or whether he is otherwise excused from doing so.

The general rule is that federal courts will not grant habeas corpus relief to state prisoners if there are any state remedies remaining for the petitioner to seek. *Frisbie v. Collins*, 342 U.S. 519, 520 (1952). Failure to pursue

available state remedies is not an absolute bar to appellate consideration of habeas corpus claims. *Granberry v. Greer*, 481 U.S. 129, 131 (1987). Courts may grant habeas relief in "special circumstances," even though the petitioner did not exhaust state remedies. *Frisbie*, 342 U.S. at 521. Determining whether such special circumstances exist is a factual appraisal for the trial court to decide, subject to appropriate appellate review. *Id.* District court findings of fact in federal habeas corpus proceedings are reviewable under a clearly erroneous standard. *See Thompson v. Armontrout*, 808 F.2d 28 (8th Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987).

Under *Wilwording v. Swenson*, 404 U.S. 249 (1971):

> [The exhaustion requirement] does not erect insuperable or successive barriers to the invocation of federal habeas corpus. The exhaustion requirement is merely an accommodation of our federal system designed to give the State an initial "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights. *Fay v. Noia*, 372 U.S. 391, 438, 83 S. Ct. 822, 848, 9 L. Ed.2d 837 (1963). Petitioners are not required to file "repetitious applications" in the state courts. *Brown v. Allen*, 344 U.S. 443, 449 n.3, 73 S. Ct. 397, 403, 97 L. Ed. 469 (1953). Nor does the mere possibility of success in additional proceedings bar federal relief.

Id. at 250. The court should determine whether it will better serve the interests of comity and federalism by requiring additional state proceedings or by addressing the merits. *Granberry*, 107 S. Ct. at 1675.

We are satisfied that this case presents special circumstances sufficient to excuse complete exhaustion of state remedies. Chitwood has made a continual good

faith effort to bring his petition before the proper forum and has faced roadblocks at every turn. Before seeking the aid of the courts, Chitwood made informal appeals to Missouri state officials for assistance and clarification of his sentence, appeals that usually did not receive a reply. When Missouri officials did respond, they failed to take any action to rectify Chitwood's predicament. Two habeas corpus petitions in state circuit courts did not win him any relief. As the prison time on his Barry County sentence had run almost to completion without any time credited against his Oklahoma sentence, Chitwood justifiably sought to preserve his rights in a federal forum.

Chitwood's case is distinguishable from *Jones v. Solem*, 739 F.2d 329 (8th Cir. 1984), in which we held that state court delay, without an additional factor such as discrimination against the petitioner or unnecessary or intentional delay by the state, is not usually sufficient to merit federal intervention. *Id.* at 331. In that case, the petitioner challenged the validity of her conviction. We did not excuse the exhaustion requirement because we found that Jones' challenge would not be rendered moot even if she was [sic] released on parole before the state's highest court ruled on the merits of her claim. *Id.* Her parole could be revoked and her conviction could have collateral consequences in the future that might be avoided by a judicial determination that her conviction was invalid. *Id.*

Chitwood, in contrast, challenges the actual time of his sentence, which is rapidly elapsing and potentially mooting his claim. Chitwood's special circumstances arise, then, not necessarily as a matter of futility, but rather as [a] potential loss of justiciability. This potential

loss combines with an "additional factor" we required in *Jones v. Solem*: Missouri state officials have disregarded, if not deliberately, at least negligently, the rights of a prisoner who sought the proper execution of his sentence. Accordingly, the district court's finding of special circumstances excusing complete exhaustion of state remedies is supported by the facts, and we do not find it clearly erroneous.

II.

Dowd next contends that even if Chitwood's habeas petition is [sic] properly before the federal courts, Chitwood has not established a violation of his rights under the Constitution or laws of the United States, as required under 28 U.S.C. § 2241. Dowd asserts that Chitwood did not have a legitimate expectation, protected by due process, that he would be transferred to Oklahoma to serve his Barry County sentence concurrently with his Oklahoma sentence. Dowd urges this position, even though the Barry County circuit court's sentence states that Chitwood's Barry County sentence was to be served concurrently with the remainder of his Oklahoma sentence and even though a Missouri statute provides that "[a] court may cause any sentence it imposes to run concurrently with a sentence an individual is serving or is to serve in another state." Mo. Ann. Stat. § 558.026.3 (Vernon Supp. 1989) (subsection 3 originally enacted as an amendment to section 558.026 in 1982).

Dowd asserts that the Barry County sentencing court had no authority to tell the Missouri Department of

Corrections where prisoners will be incarcerated. Dowd interprets section 558.026.3 to operate only when the prisoner is already in the custody of another state. Thus, contends Dowd, the statute does not give Missouri courts any authority to order that the Missouri Department of Corrections transfer a prisoner.

Chitwood's Barry County sentence does not specifically order that Chitwood be transferred to Oklahoma. Nor does section 558.026 speak in terms of transferring inmates to other jurisdictions. We do not adopt, however, Dowd's restrictive view of the Missouri courts' power. A Missouri court's sentence has meaning only if the Department of Corrections has the duty to execute the sentences according to the court's instructions. The courts are given the authority to sentence defendants, not the Missouri Department of Corrections. Chitwood's sentence implicitly requires that Chitwood be transferred to Oklahoma, for that is the only course of action that will ensure that the Oklahoma sentence will run concurrently with the Barry County sentence. As Dowd has repeatedly pointed out, Missouri has no control over how Oklahoma runs the time of its prisoners' sentences.

We do not agree that section 558.026 does not give the Missouri courts the power to order transfer of a defendant to another jurisdiction. On the contrary, the statute[,] on its face[,] indicates that the [L]egislature intended to broaden the courts' discretion to order transfer. Under Dowd's interpretation, Missouri courts could impose sentences concurrent with sentences of other jurisdictions only when the Missouri courts do not have custody of the prisoner. Such an interpretation would so restrict the statute as to nullify it. We conclude, therefore,

that the Department of Corrections had a duty to execute the sentence of the Barry County circuit court, and that the court had the authority to sentence Chitwood to serve his Barry County sentence concurrently with his Oklahoma sentence in Oklahoma.

In addition, we also find that Chitwood had a legitimate expectation that the Department of Corrections would transfer him to Oklahoma. Where state law gives the trial jury the discretion to impose criminal punishment, the criminal defendant has a "legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion." *Hicks v. Oklahoma*, 447 U.S. 343, 346 (1980). That expectation is a liberty interest protected by the due process clause of the fourteenth amendment. *Id.*

The same reasoning applies in this case. Under Missouri statute, the discretion to sentence the defendant is vested in the trial court. One element of that discretion is found in section 558.026.3. When the trial court exercises its discretion under the statute, a defendant has a legitimate expectation that he will be deprived of his liberty only to the extent determined by the court. That expectation is a liberty interest, protected by due process and enforceable by way of habeas corpus.

III.

Finally, Dowd challenges the district court's remedy. The district court unconditionally released Chitwood from serving any time remaining on either his Barry County or Boone County sentences. The district court did

not determine what time would remain on the Missouri sentences if Chitwood had been transferred to Oklahoma immediately after his Barry County sentencing. Unconditional release from all remaining Missouri time may not be justified if, after serving his time in Oklahoma, Chitwood would have had remaining time to serve in Missouri.

We remand, therefore, to the district court for findings on (1) when Chitwood would have completed his Missouri sentences had he been transferred to Oklahoma within twenty-four hours of his Barry County sentencing, and (2) when Chitwood will complete his sentence in Oklahoma once he is actually transferred to Oklahoma. Upon making those findings, the district court shall order that Chitwood serve any time on his Missouri sentences that would have exceeded the actual Oklahoma time. The district court shall also order that Chitwood be returned to Missouri to serve any time he might have remaining there in the event he receives any type of conditional release before completing his Oklahoma sentence.[2]

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[2] We have been informed that following our September 5, 1989, order that lifted the stay in part, Missouri officials made arrangements to transfer Chitwood to the Oklahoma Department of Corrections but that the transfer has not been accomplished because Chitwood has refused to sign a waiver of extradition from Oklahoma back to Missouri, as required by the state of Oklahoma as a condition precedent to accepting the transfer. We conclude that whatever the merits of Chitwood's position, this is an issue that is not properly before us at this time, and in any event may be moot in the light of our directions on remand.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

David Chitwood	)	
	)	
Petitioner,	)	No. 88-265C(4)
vs.	)	
DENIS DOWD, et al	)	
	)	
Defendants.	)	

JUDGMENT

Pursuant to the Court's Order of June 8, 1989, Judgment is entered in favor of the petitioner.

EYVON MENDENHALL, CLERK

/S/ (ILLEGIBLE)
By deputy Clerk

Dated 6-14-89

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVID CHITWOOD,	)	
	)	
Petitioner,	)	Cause No.
v.	)	88-265-C (4)
	)	
DENNIS DOWD, et al.,	)	
	)	
Respondents.	)	

ORDER
(Filed June 8, 1989)

This matter comes before the Court on the Report and Recommendation of the United States Magistrate concerning petitioner David Chitwood's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2241. In the ensuing months since the Magistrate issued his report, petitioner's counsel has been diligently pursuing a non-judicial resolution to this matter. These efforts, however, have proven unsuccessful. Consequently, the Court has reviewed and carefully considered petitioner's request for habeas corpus relief and the Report and Recommendation of the Magistrate concerning said request.

This Court concurs with the reasoning of the Magistrate's report and finds that the petitioner is entitled to habeas relief pursuant to 28 U.S.C. §2241. Section 2241 provides a remedy for instances, such as the present one, where state correctional personnel fail to properly execute a defendant's prison sentence. *See United States v. Miller*, 835 F.2d 181, 186 (8th Cir. 1987). Specifically, the Magistrate found[,] and the Court accepts that the "respondents had the duty and authority to execute the

sentence of the Circuit Court of Barry County" which would have meant petitioner's immediate transfer to the State of Oklahoma where he would have served his seven-year Barry County sentence concurrently with the remaining 3 years, 11 months and 23 days he was to serve in Oklahoma. Had respondents transferred petitioner to Oklahoma in 1984, he would have completed his Oklahoma sentence in early 1988. Respondents' failure to do so resulted in petitioner[']s having to serve over four years of the Barry County sentence in Missouri, followed by three years for his Boone County conviction, and then having to face nearly four years[']' jail time in Oklahoma. Clearly, this is not the length of punishment intended by the Barry County court[,] and, [sic] therefore, petitioner has demonstrated his entitlement to relief.

In so ruling, the Court does not ignore the respondents' position that the petitioner has failed to exhaust his state remedies. The Court, however, agrees with the Magistrate's finding that petitioner's claim presents special circumstances[,] and requiring him to return to state court now would prove futile.

The Court also recognizes the Magistrate's recommendation that the petitioner may have a cognizable 42 U.S.C. § 1983 claim. Nonetheless, because the Court intends to grant petitioner's habeas request and transfer him to Oklahoma, it may prove less difficult for petitioner to prosecute that action if he files a new suit in the Oklahoma District Court. Accordingly,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate be and it is

sustained and adopted as the order of the Court but only as to the following rulings.

IT IS HEREBY ORDERED that petitioner's motion for summary judgment is granted.

IT IS FURTHER ORDERED that respondents are to transfer petitioner to the custody of the State of Oklahoma within 30 days of the entry of this order.

IT IS FURTHER ORDERED that petitioner be and is unconditionally released from serving his Barry County, Missouri, [sic] sentence and from any remaining time petitioner may have to serve on his Boone County, Missouri, [sic] sentence.

Date this 8th day of June, 1989.

/s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DAVID CHITWOOD, Petitioner,	)	
v.	)	No. 88-265 C (4)
DENNIS DOWD, ET AL., Respondents.	)	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE
(Filed May 13, 1988)

This cause is before the Court on the petition of Missouri state prisoner David Chitwood for a writ of habeas corpus under 28 U.S.C. §2241.[1] This matter was referred to the undersigned United States Magistrate for review and a recommended disposition. 28 U.S.C. §636(b).

On January 10, 1984, petitioner David Chitwood pled guilty in the Circuit Court of Barry County to one count of second degree burglary. He was sentenced as a persistent offender to seven years[']imprisonment. The court ordered that the sentence run concurrently with the remainder of a sentence imposed against petitioner in the

[1] The undersigned finds that petitioner also states a claim under 42 U.S.C. §1983, and, as noted herein, should be granted leave to amend his filing to add a count under that statute. It is further noted that the parties have filed cross-motions on the issues of federal habeas corpus relief and possible §1983 claims in this action.

State of Oklahoma.[2] (Petitioner's exhibits and supplemental exhibits, filed April 28, 1988, *at* Tab 5) [hereinafter "Tab ___."]

On January 14, 1984, petitioner pled guilty in the Circuit Court of Boone County to two counts of forgery. He was sentenced to two three-year concurrent terms of imprisonment, said sentences to be served consecutively to the Barry County and Oklahoma sentences. (Tab 7.) Thus, petitioner was sentenced to terms of imprisonment by the Missouri courts totaling ten years. Of this time[,] three years, eleven months and twenty-three days was [sic] to be served concurrently with petitioner's Oklahoma sentence. (Tab 5.)

On February 10, 1988, petitioner filed the instant action under 28 U.S.C. §2241. He alleges that respondents have failed to properly execute the sentence imposed upon him by the Circuit Court of Barry County. Specifically, petitioner argues that the Missouri Department of Corrections and Human Resources had a duty to effectuate the Barry County sentence by transferring him to Oklahoma correctional authorities in order for him to complete his remaining sentence in that state. In this

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[2] On August 2, 1982, petitioner pled guilty to one count of second degree forgery in the District Court for the Seventh Judicial District of Oklahoma. He was sentenced to five years['] imprisonment. (Tab 1.) Petitioner escaped from the custody of the Oklahoma Department of Corrections on July 4, 1983. (Petitioner's *pro se* "Brief in Support of Petition for Writ of Habeas Corpus," *at* 1; Tab 18.) At the time of his sentencing in Barry County, petitioner had three years, eleven months, and twenty-three days remaining to be served on his Oklahoma sentence. (Tab 4.)

manner, petitioner contends that he would have been able to serve the Barry County sentence concurrently with the Oklahoma sentence.[3] Because he was not transferred to Oklahoma, petitioner argues that he will be imprisoned beyond the terms of his sentences. Had petitioner been returned to Oklahoma custody the day after his Barry County sentencing, his Oklahoma sentence would have been completed on January 3, 1988. If he had been returned to Oklahoma the day after his Boone County sentencing, his Oklahoma sentence would have been completed on January 7, 1988. Petitioner stated that he is scheduled for a conditional release from the Barry County sentence he is now serving on May 13, 1988. He will then begin his term of imprisonment for his Boone County convictions. Upon release from those sentences, conditionally set for May 13, 1990 (Tab 23), petitioner will then still have the remainder of his Oklahoma sentence to complete.

In short, petitioner contends that he will have incurred an additional term of imprisonment of three years, eleven months and twenty-three days, because respondents failed to transfer him to the Oklahoma Department of Corrections after his sentencing by the Missouri

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[3] It is not disputed by respondents that Oklahoma will not count time served in Missouri by petitioner against his Oklahoma sentence. (Tab 17.) However, Missouri would have credited petitioner with time served in Oklahoma against his Barry County sentence had petitioner been transferred to Oklahoma custody after his Missouri convictions. Furthermore, Oklahoma correctional authorities were willing to accept petitioner into custody had Missouri been willing to transfer him. (Tab 18.)

courts. Petitioner argues that respondents have thus wilfully violated his rights to due process and equal protection of the laws.

Respondents argue that petitioner's claim should be characterized as an attack upon his guilty plea to the Circuit Court of Barry County. Specifically, respondents contend that the petitioner alleges a breach of a plea bargain agreement, and thus he states a claim under *Santobello v. New York*, 404 U.S. 257 (1971). The claim[,] thus characterized, the petitioner is argued to have an available state remedy under Missouri Supreme Court Rule 24.035, formerly Rule 27.26, that he has not yet exhausted and has, in fact, deliberately bypassed. Even if petitioner's claim is not cognizable under Rule 24.035, respondents contend, [sic] he may pursue either a declaratory judgment action in the state courts or a successive state habeas to the Missouri appellate courts. Finally, respondents argue that the State of Missouri cannot control the manner in which the State of Oklahoma computes its inmate sentences[,] and, [sic] in any event, the State of Oklahoma is not alleged by petitioner to have made any promise of concurrent sentencing to him in order for a *Santobello* claim to be enforced against it.

Respondents' arguments miss the point of the instant claim entirely. If petitioner were attacking his Barry County guilty plea and sentence, respondents' arguments would have merit. Petitioner would be required to exhaust his available, nonfutile state remedies before federal habeas corpus relief would be available to him. *Laws v. Armontrout*, 834 F.2d 1401, 1412 (8th Cir. 1987).

Furthermore, petitioner would have a Rule 24.035 motion available to him until June 30, 1988. Missouri Supreme Court Rule 24.035(1).

The initial and subsequent filings by petitioner repeatedly make it clear that he is not seeking federal habeas relief by challenging the validity or lawfulness of the Barry County sentence. (Petition, *at* 3, ¶IV.) It is the execution of his Barry County sentence by respondents that petitioner attacks in the instant action. (*Id.*) He specifically states this claim throughout his *pro se* pleadings and memoranda. Petitioner contends that respondents possessed the legal authority to transfer him to Oklahoma in order to effectuate his Barry County sentence[,] but that they willfully violated his due process rights by their failure to do so. (*Pro se* brief in support of petition for writ of habeas corpus, *at* 5-6; Traverse, *at* 2-3.)

Respondents argue that the instant claim before the Court is the same as the one presented by petitioner in 1987 in the United States District Court, Western District of Missouri. (*Chitwood v. Armontrout*, Cause No. 87-0055-CV-W-9-1-P, slip op. (W.D. Mo. August 7, 1987); Resp. Exh. B.) It is apparent from reviewing the District Court's opinion in that action that petitioner was attacking the Barry County sentence as "illegal," because that sentence and his Oklahoma sentence could not, as a matter of law, be said to run concurrently under the then existing circumstances. (*Id.*, *at* 3.) Furthermore, petitioner appears to clearly be [sic] alleging a violation of his plea bargain agreement with the Barry County Prosecutor. (*Id.*, *at* 2-3.)[4]

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[4] The undersigned notes that respondents have not submitted a copy of the 1987 petition, and thus petitioner's claim

(Continued on following page)

These are not the allegations petitioner presents to this Court, and respondents' argument that the *Santobello* claim has been unexhausted and deliberately bypassed are [sic] to no avail.

It is also apparent that petitioner has no available, non-futile state remedies in which to present his claims before the state courts. A challenge to the manner in which public officials implement a properly imposed sentence is not a proper subject for Rule 27.26, now Rule 24.035, relief. *State of Missouri v. Todd*, 433 S.W.2d 550, 555 (Mo. 1968), *cert. denied*, 394 U.S. 910 (1969); *Stout v. State of Missouri*, 745 S.W.2d 237, 238 (Mo. App. 1988); *see, Fields v. State of Missouri*, 572 S.W.2d 477, 480 (Mo. banc 1978).

Furthermore, petitioner need not present the instant claim as an action for declaratory judgment in the state courts nor must he file a successive petition for a writ of habeas corpus in the state appellate courts in order to comply with the exhaustion requirement. "The exhaustion requirement is merely an accommodation of our federal system designed to give the state an initial 'opportunity to pass upon and correct' alleged violations of its prisoners' federal rights." *Wilwording v. Swenson*, 404

(Continued from previous page)

therein has been determined from the Court's opinion in *Chitwood v. Armontrout, supra*. Because of the clarity of the Court's description of petitioner's claim presented therein, the undersigned has concluded that a copy of the court record of that action was not required for this Report and Recommendation and a request for it would serve only to delay a disposition of the instant matter.

U.S. 249, 250 (1971) (per curiam), *quoting Fay v. Noia*, 372 U.S. 391, 438 (1963). Neither repetitious applications nor pursuit of conjectural avenues of state relief are [sic] required of petitioner. *Wilwording, supra*, 404 U.S. *at* 250.

Although respondents argue that petitioner might be able to seek a declaratory judgment in the state courts, this is a matter of conjecture only. No cases are cited by respondents to support their contention. While an action for declaratory judgment may be appropriate to correct some sentences under Missouri law, it is not apparent that such an action would be a proper remedy in the present case. *See, Ford v. State of Missouri*, 639 S.W.2d 894, 896 (Mo. App. 1982) (claim for prior jail time appeared to be appropriate under action for declaratory judgment). Petitioner need not pursue such a hypothetical state remedy. *Wilwording, supra*, 404 U.S. *at* 250.

In the present matter, petitioner presented his claim to the Circuit Court of St. Francis County in the form of an application for a writ of habeas corpus, pursuant to Missouri Supreme Court Rule 91.02. (Tab 24.) After the state court's denial of habeas relief, petitioner sought advice from counsel on whether to pursue an appeal of the denial of the state writ. (Tab 27.) After being advised that there was no general right of appeal from the denial of such an action (Tab 30), petitioner pursued the instant action. *See, In re C.S.N. and M.S.N., Minors*, 685 S.W.2d 567, 568 (Mo. App. 1985); *Bebee v. State of Missouri*, 619 S.W.2d 363 (Mo. App. 1981).

"The exhaustion-of-state-remedies rule should not be stretched to the absurdity of requiring the exhaustion of . . . separate remedies when[,] at the onset[,] a

petitioner cannot intelligently select the proper way, and in conclusion he may find only that none of the [alternatives] is [sic] appropriate or effective." *Wilwording, supra,* 404 U.S. *at* 250, *quoting Marino v. Ragen,* 332 U.S. 561, 568 (1947). Given petitioner's circumstances – the lack of clarity as to which remedy to seek in order to effect a speedy resolution of the merits of his cause and the imminent completion of his Barry County sentence – the undersigned concludes that petitioner need not further attempt exhaustion of possible state remedies. Rather, his case presents special circumstances requiring immediate action by the federal courts. *Ex Parte Royall,* 117 U.S. 241, 253 (1886); 28 U.S.C. §2254(b).

Addressing the merits of petitioner's claim for federal habeas relief, the undersigned concludes that his due process rights under the Fourteenth Amendment have been, and continue to be, violated by the manner in which respondents have failed to properly execute his Barry County sentence. The sentence, in the pertinent part, states the following:

> This sentence will run concurrently with the remainder of a sentence imposed against Defendant in the State of Oklahoma County, Oklahoma, Case No. CRF82-2928, which sentence has not been completed.

(Tab 5.) Petitioner has a constitutionally protected expectation that he will suffer only that deprivation of his liberty allowed by statute and determined by the sentencing court. *See, Hicks v. Oklahoma,* 447 U.S. 343, 346 (1980).

Under Missouri law, "[n]o person's body shall be imprisoned or restrained unless authorized by law." R.S.Mo. §1.20 (1969). The Circuit Court of Barry County

had the authority to sentence petitioner to a term of imprisonment to run concurrently with a sentence petitioner was to serve in another state. R.S.Mo. §558.026.3 (1983).

Respondents had the duty and the authority to execute the sentence of the Circuit Court of Barry County. R.S.Mo. §§217.015, 217.020 *et seq.* Furthermore, as witnessed by the letter of Mr. John A. Lewright, Prosecuting Attorney for Barry County, Missouri, there was never any uncertainty that petitioner "was to be transported and transferred *as required* in order to carry out the concurrent sentence." (Tab 31) (emphasis added).

Having determined that petitioner is entitled to federal habeas corpus relief, that relief must next be determined. As noted above, had petitioner been transferred to Oklahoma immediately after his sentencings in Missouri, he would already have completed his Oklahoma sentence. Although respondents have now offered to transfer petitioner to Oklahoma (Tab 28), the undersigned agrees with him that this offer is "too little, too late," in light of the fact that his conditional release date from his Barry County sentence is set for May 13, 1988. Petitioner would be forced to serve nearly four years in Oklahoma custody and still face three years incarceration in Missouri on his Boone County sentence upon his Oklahoma release.

28 U.S.C. §2242 provides[,] in part[,] that in a federal habeas corpus proceeding[,] the court "shall . . . dispose of the matter as law and justice require." *See, Peyton v. Rowe*, 391 U.S. 54, 66-67 (1968). Under this provision, and other provisions of the Act, the Court may order absolute

or conditional discharge from custody. *See*, Wright, "Procedures for Habeas Corpus," 77 F.R.D. 227, 247 (1978). However, the statute also grants the federal courts power to fashion appropriate relief other than immediate or conditional release. *Id.; Carafas v. LaVallee*, 391 U.S. 234, 239 (1968).

The undersigned therefore recommends that respondents be ordered to transfer petitioner to the custody of the State of Oklahoma as soon as practicable so that he may begin his term of imprisonment there. It is further recommended that the time of his unlawful confinement be credited against the time petitioner must serve on his Boone County sentence. *State of Missouri v. Caffey*, 438 S.W.2d 167, 174 (Mo. 1969).

Although this action, if accepted by the District Court, would grant petitioner the relief he seeks, the undersigned believes that his petition states a claim under 42 U.S.C. §1983 as well. This Court suggested[,] during an evidentiary hearing[,] that it might consider petitioner's pleading under §1983; but it has determined that an action in habeas corpus is the appropriate vehicle for petitioner to challenge the fact or duration of his imprisonment. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973); *Roderick v. Bond*, 553 F.Supp. 183, 184 (E.D. Mo. 1982).

There still remains, however, the fact that petitioner will not be released from Oklahoma custody until sometime in June 1992 even if he were transferred immediately. In light of the fact that had respondents executed his Barry County sentence correctly in the first instance, petitioner would have been released from Oklahoma custody in January 1988, and Missouri custody on May 13,

1990, a mere transfer of custody to Oklahoma and crediting of time against his Boone County sentence appears grossly unjust and inadequate. Petitioner should be allowed to amend his habeas petition to set forth his §1983 claim for an unconstitutional deprivation of liberty as well. *Wilwording, supra,* 404 U.S. *at* 251. This amending of the pleadings should not, however, delay the granting of the instant relief petitioner seeks herein.

RECOMMENDATION

In view of the above discussion, it is the recommendation of the undersigned United States Magistrate that the motion for summary judgment of the petitioner be granted and the motion of the respondents be denied. Petitioner should be granted federal habeas corpus relief, and respondents should be ordered to transfer him to the custody of the State of Oklahoma within a period of time set by the Court. Respondents should also be ordered to credit the time of petitioner's unlawful confinement against the time he must serve on his Boone County sentence. Finally, petitioner should be granted leave to amend the pleadings so as to set forth any claims he may possess under 42 U.S.C. §1983. The parties are advised that they have eleven (11) days in which to file written objections to this Report and Recommendation.

/s/ David D. Noce
UNITED STATES MAGISTRATE

Signed this 13th day of May, 1988.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

DAVID CHITWOOD, Reg.#149019 1012 W. Columbia Farmington, Missouri 63640 Petitioner, -V- DENIS DOWD, Superintendent, Farmington Correctional Center, Farmington, Missouri Respondent, & WILLIAM WEBSTER, Attorney General of the State of Missouri, MISSOURI DEPARTMENT OF CORRECTIONS, P.O. Box 236 Jefferson City, Missouri Additional Respondents,	CAUSE NO.** — 88-0265-6-4 PETITION UNDER 28 USC 2241 et seq., FOR WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY (ORAL ARGUMENT REQUESTED) (Filed Feb 10, 1988)

PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW the petitioner, David Chitwood, *in propia personnam* and *pro se*, pursuant to RSMO. 532.101 and 532.020; Supreme Court Rule 91 *et seq.*, Missouri Constitution, Article I, Sec. 12; and Article 1, Sec. 9, cl. 2, United States Constitution, and respectfully states and deposes the following:

I.

Petitioner is presently in the custody of the respondent, Denis Dowd, Superintendent of the Farmington Correctional Center, Farmington, Missouri, which is an institution of the Missouri Department of Corrections, and petitioner has been so confined in the Missouri Department of Corrections since 13 January 1984.

II.

Petitioner is presently unconstitutionally detained and imprisoned at the Farmington Correctional Center, Farmington, Missouri, by respondent Denis Dowd, Superintendent of said facility, by virtue of a sentence and judgment of seven (7) years, pronounced by the Honorable William H. Pinnell, Circuit Court Judge of Barry County, Cassville, Missouri, said term of confinement imposed upon petitioner on the 10th day of January 1984, said sentence being for the conviction of Burgulary [sic] 2nd Degree (persistent offender), and sentence was imposed by virtue of a plea of guilty pursuant to an Alford Plea, resulting from a plea bargaining agreement, and said sentence was ordered by the trial court in Barry County to run and be served concurrently with a previous sentence imposed upon petitioner in the State of Oklahoma. See attached *EXHIBITS "A" and "C"*.

III.

Petitioner states that he has made prior application for a writ of habeas corpus, on the issues raised herein, to both the United States District Court, Western District of

Missouri, and to the Circuit Court of St. Francois County, Farmington, Missouri. In each instance the results were:

A. In the United States District Court, Western District of Missouri, petitioner filed [a] petition for writ of habeas corpus on 23 January 1987, cause no. 87-0055-CV-W-9-P, on 5 August 1987, the case was transferred to the Central Division in Jefferson City, Missouri, case was assigned to the Honorable John W. Oliver, on 7 August 1987, Judge Oliver issued an order denying the petitioners application for writ of habeas corpus, because the petitioner had failed to exaust [sic] available [s]tate [c]ourt postconviction [sic] remedies.

   1. Petitioner's petition for writ of habeas corpus was dismissed by the United States District Court, Western District of Missouri, without prejudice to petitioner['s] filing a sucessive [sic] petition in the Missouri [s]tate [c]ourt(s).

B. Petitioner filed a second petition for writ of habeas corpus on 5 November 1987, in the Circuit Court of St. Francois County, Farmington, Missouri, cause no. CV587-67300; hearing was held on 11 December 1987, and on 14 December 1987, the Honorable James H. Kelly held that petitioner's petition for writ of habeas corpus was denied, without prejudice, on the grounds that petitioner was under lawful sentence and custody of the respondent and the Missouri Department of Corrections.

IV.

In each of petitioner's prior applications for writ of habeas corpus; the petitioner has not sought to challenge either the validity or lawfulness of the sentence imposed by the Barry County Circuit Court, nor does petitioner seek to challenge such in this petition for writ of habeas corpus, petitioner has sought and is seeking to challenge

the authority of the respondent and the Missouri Department of Corrections [and] by what authority the petitioner is held and not allowed to serve the specific sentences to which he was sentenced.

V.

A. Petitioner contends that the execution of the Barry County, Missouri sentence by the respondent(s) has denied petitioner his [c]onstitutional rights of "DUE PROCESS & EQUAL PROTECTION", as garuanteed [sic] in the Fifth and Fourteenth Amendments of the United States Constitution.

B. Petitioner contends that the execution of the Barry County, Missouri sentence by the respondent(s) has [violated] and is violating the "FULL FAITH & CREDIT DOCTRINE" as outlined in Article IV I 1 of the United States Constitution.

C. Petitioner contends that the execution of the Barry County, Missouri sentence by the respondent(s) violates the Doctrine of *Res Judicata* and places petitioner in circumstances of jeapordy [sic].

D. Petitioner contends that the execution of the Barry County, Missouri sentence by the respondent(s) has acted to violate both the plea agreement of the petitioner and the sentencing orders of the Barry County Circuit Court.

VI.

A. The petitioner was sentenced by the Circuit Court of Barry County, Missouri to a seven (7) year sentence, said sentence ordered by the Court to run and be served concurrently with the remainder of a previous sentence imposed upon petitioner in the [S]tate of Oklahoma. The respondent(s)[']' failure to transfer petitioner to the proper authorities of the State of

Oklahoma has thus prevented petitioner from serving concurrent sentences, see attached EXHIBIT "D(*), thus the respondent(s) has denied petitioner his rights as garuanteed [sic] in the Fifth and Fourteenth Amendments of the United States Constitution.

B. The petitioner entered into a plea bargaining agreement, in accordance with the conditions and terms as set out in attached EXHIBIT "B(*), he was enticed by the conditions of the plea agreement to enter his plea of guilty, he entered into the plea agreement in good faith, but the mis-execution of the Barry County sentence by the respondent(s) has in fact violated the FULL FAITH & CREDIT DOCTRINE as their execution of the Barry County sentence has denied the petitioner to receive credit towards his Oklahoma sentence while confined in Missouri.

C. The Barry County, Missouri sentence was imposed pursuant to, and in accordance with, the terms and conditions of the petitioner's plea agreement, it was therefore the respondent(s)['] responsibility to honor the terms and conditions of the concurrent sentences, failure to ensure that the petitioner was in fact serving concurrent sentences has now subjected the petitioner to jeapordy [sic] of serving the Oklahoma sentence twice as petitioner is to be returned to the State of Oklahoma upon release from the Missouri Department of Corrections in May 1990, thus subjecting the petitioner to double jeopardy, by beginning to serve a sentence in 1990 which should have expired in January 1988, and [which] would have expired except for the mis-execution of the Barry County sentence by the respondent(s) in failing to transfer the petitioner to the State of Oklahoma to serve said concurrent sentences.

D. The Barry County Circuit Court accepted petitioner's plea of guilty and sentenced the petitioner in accordance with the terms and conditions of the plea agreement as outlined in petitioner's attached EXHIBIT "B(*), the respondent(s)['] failure to transfer petitioner to the State of Oklahoma has kept the petitioner from serving the concurrent sentence which the Court imposed and has thus violated the plea agreement and the sentencing order of the Barry County Circuit Court.

ARGUMENT

The petitioner entered into a plea bargain agreement in accordance with the terms and conditions as outlined in attached EXHIBIT "B(*), he entered into this plea agreement under the FULL FAITH & CREDIT DOCTRINE, as outlined in Article IV § 1 of the United States Constitution, and took it upon good faith that[,] as a result of his plea of guilty[,] that he would in fact be allowed to serve concurrent sentences.

Upon the acceptance of petitioner's plea of guilty, the trial [c]ourt of Barry County pronounced sentence upon the petitioner in accordance with the terms of the plea agreement[,] as outlined in attached EXHIBIT "B(*)," see also attached EXHIBIT "A". Thus[,] the trial court did honor the petitioner's plea bargaining agreement, though in fact to do so at the time[,] the Court had to act absent the existence of express statutory provision. Petitioner asserts however, that though there existed an absence of statutory provision authorizing the sentence imposed, that the conditions and terms of the sentence must be honored by the respondent(s), as such sentence was the result of a plea bargaining agreement, which agreement

acted to entice the petitioner into entering a plea of guilty. See *Brock v. Sowders*, 610 S.W.2d 591; *Workman v. Commonwealth*, Ky., 380 S.W.2d 206, 207 (1979).

The judgment entered by the Circuit Court of Barry County explicitly provided that petitioner's Barry County sentence would run concurrently with the remainder of petitioner's Oklahoma sentence. As petitioner's Oklahoma sentence was the first sentence imposed[,] it thereby gave the State of Oklahoma the original forum of jurisdiction, and as it was the Circuit Court of Barry County which imposed the concurrent sentence with the sentence in Oklahoma, and not Oklahoma which ran their [sic] sentence concurrent with that of Missouri, petitioner should have been immediately transferred to the proper authorities in the State of Oklahoma by the respondent(s) so as to allow petitioner to serve concurrent sentences to which he had been sentenced.

Failure of the respondent [sic] and the Missouri Department of Corrections to transfer petitioner to the proper authorities of the State of Oklahoma has thus enhanced and lengthened the period of confinement to which the petitioner was legally sentenced. As petitioner was legally sentenced for a period of seven (7) years and because of the mis-execution of the Barry County sentence, petitioner is now confronted with and faced with serving a total of ten (10) years, eleven (11) months, and twenty-three (23) days for completion of sentences that were thus ordered to run and be served concurrently, and if so executed properly, said sentences would have had a maximum expiration of seven (7) years[,] *not* ten (10) years, eleven months and twenty-three days.

Said enhancement of petitioner's total period of incarceration from that of seven (7) years maximum, to that of ten (10) years, eleven (11) months, and twenty-three (23) days, denies petitioner his garuanteed [sic] Constitutional rights of "DUE PROCESS & EQUAL PROTECTION" as garuanteed [sic] in the Fifth and Fourteenth Amendments of the United States Constitution; wherein petitioner is being denied the right to serve the concurrent sentences to which he was sentenced by the Barry County Circuit Court, because of the respondent(s)['] willful, and malicious refusal to transfer the petitioner to the proper authorities of the [S]tate of Oklahoma, as had petitioner been so transferred, petitioner's Oklahoma sentence would have been satisfied in it's [sic] entirety on 3 January 1988, at which time the Missouri Department of Corrections would have had legal right and jurisdiction to take petitioner into custody for completion of any unexpired time on petitioner's Barry County, Missouri sentence.

Because of respondent(s)['] wilful and malicious execution of petitioner's Barry County, Missouri sentence, by not assuring that petitioner was serving both the Barry County, Missouri and the Oklahoma County, Oklahoma sentences, the mis-execution by the respondent(s) has placed the petitioner in jeapordy [sic] of his freedom and liberty without legal cause.

Based upon petitioner's Barry County, Missouri sentence, the petitioner is/or should have been eligable [sic] for release on 13 May 1988, and at such time the petitioner would have been released on Conditional Release by the Missouri Department of Corrections on said Barry County, Missouri sentence. Thus petitioner would have

been free of all restraint of his freedom and liberty on both the Oklahoma County, Oklahoma and Barry County, Missouri sentences on 13 May 1988; at which time petitioner would have begun serving a consecutive sentence imposed to run and be served consecutively [to] both the Oklahoma and Barry County sentences by the Circuit Court of Boone County, Columbia, Missouri.

Petitioner would have been required to serve a maximum of two (2) years on the consecutive three (3) year sentence by the Boone County Circuit Court; thus making petitioner entitled to release from *all* legal restraint upon his liberty and freedom by both the State of Missouri and the State of Oklahoma on 13 May 1990.

However, because of the wilful and malicious execution of the Barry County sentence by the respondent(s), in failing to transfer petitioner to the State of Oklahoma on 13 January 1984, when received into the Missouri Department of Corrections, petitioner's Oklahoma sentence has not resumed running and therefore subjects petitioner to an extended term of incarceration of three (3) years, eleven (11) months and twenty-three (23) days in the State of Oklahoma when released from Missouri Department of Corrections on 13 May 1990.

SUMMARY OF THE ARGUMENT

The petitioner received a seven (7) year sentence from the Circuit Court of Barry County, Cassville, Missouri, said sentence to run and beserved [sic] concurrently with the petitioner's previous sentence in the State of Oklahoma, which sentences in the State of Oklahoma having an unexpired term of three (3) years, eleven (11)

months and twenty-three (23) days, thus both the Oklahoma and the Barry County sentences would have simultanouesly [sic] made petitioner eligable [sic] for a maximum release date of 13 May 1988. At which time petitioner would have begun serving a consecutive three (3) year sentence from Boone County, Missouri, and after a maximum of two (2) years, on 13 May 1990, the petitioner would have been released from all sentences.

All combined sentences of the petitioner subject the petitioner to a total term of encarceration [sic] *not* to exceed ten (10) years, and a maximum release under parole supervision occuring [sic] on 13 May 1990.

The wilful and malicious execution of the Barry County sentence by the respondent(s) subjects the petitioner to release on 13 May 1990[,] only on petitioner's Missouri sentences, petitioner would then be returned to the State of Oklahoma to begin serving the three (3) years, eleven (11) months and twenty-three (23) days remaining on the Oklahoma sentence, thus subjecting the petitioner to an enhancement of the maximum release date of 13 May 1990[,] to that of 07 May 1994, thus denying the petitioner "DUE PROCESS & EQUAL PROTECTION" rights by restraining petitioner's liberty beyond that of lawful custody.

PRAYER OF RELIEF

WHEREFORE, petitioner respectfully requests:

A. That this Court so order the respondent(s) to answer the allegations as set forth in this petition.

B. That this [C]ourt, if needed, grant the petitioner the opportunity to present oral argument.

C. That after full consideration this Court relieve petitioner of the unconstitutional restraint upon his liberty by the respondent(s).

D. That this Court order that the remainder of petitioner's Missouri sentences be set aside, whereby denying the respondent(s) any future and further legal right to restrain the petitioner of his freedom and liberty.

E. That this Court direct[,] upon issuance of a writ of habeas corpus[,] that the State of Oklahoma be given only twenty-four (24) hours in which to obtain custody of the petitioner, and in the event that the State of Oklahoma should fail to assume custody, that the respondent(s) be order [sic] to release petitioner free of *all* restraint upon his liberty.

F. That this Court grant any further relief that it may deem just, proper and equitable under the law.

Respectfully submitted,

/s/ David Chitwood
DAVID CHITWOOD,
Reg.#149019
F.C.C., 1-D-17
1012 W. Columbia
Farmington, Missouri
63640

JURAT

I hereby certify (verify or state) under penalty of purgury [sic] that the foregoing petition is true and correct to the best of my knowledge and belief.

Verily saith I,

/s/ David Chitwood,
David Chitwood,

affiant-petitioner
In propia personnam, *pro se*

subscribed and sworn to before me this 12 day of Jan. 1988.

ARNOLD S. DEMENT, Notary Public State of Missouri, St. Francois County My Commission Expires March 30, 1991.

/s/ Arnold S. Dement
Notary

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

DAVID CHITWOOD, Petitioner,	)	
-V-	)	CAUSE NO.**_____
DENIS DOWD, Respondent,	)	88-0265-c-4 (Filed Feb. 10, 1988)

PETITIONER'S EXHIBITS, SUBMITTED AS EVIDENCE IN ABOVE ENTITLED CAUSE

COMES NOW the petitioner, David Chitwood, *in propia personnam* and *pro se*, and[,] as evidence to support his claims in the above-styled action[,] presents to the Court the following documents:

1. Exhibit "A", sentence and judgement [sic] of the Barry County Circuit Court.
2. Exhibit "B", letter from petitioner's trial lawyer[,] outlining the plea agree – [sic] to which petitioner entered his plea of guilty.
3. Exhibit "C", judgment and sentence of the Oklahoma County, Oklahoma sentence.

4. Exhibit "D", letter addressed to petitioner from the Deputy Director of the Oklahoma Dept. of Corrections.

5. Exhibit "E", sentence and judgement [sic] of the Boone County, Missouri sentence.

6. Exhibit "F", letter addressed to Missouri officials from the Acting Administrator of the Oklahoma Dept. of Corrections.

7. Exhibit "G", letter to Records Manager, Missouri State Penitentiary, from the Sentence [A]dministrator of the Oklahoma Dept. of Corrections.

8. Exhibit "H", detainer lodged against petitioner in favor of Oklahoma Dept. of Corrections for completion of Oklahoma sentence.

9. Exhibit "I", letter from petitioner to records office of Mo. State Penitentiary, and response thereto.

10. Exhibit "J", letter from Mo. Office of Interstate Compact to petitioner.

Petitioner states that each of the foregoing documents are [sic] [a] true and correct copies [sic] of the original documents, [sic] petitioner presents these as evidence to be refferred [sic] to and incorporated into petitioner's pleadings, *i.e.*[,] petition, brief in support etc . . . Petitioner prays this Court accept thesedocuments [sic] and enter them in as evidence.

Respectfully submitted,

/s/ David Chitwood
David Chitwood,
petitioner-movant
In propia personnam, *pro se*

EXHIBIT A

CERTIFIED COPY OF SENTENCE AND JUDGMENT OF COURT AND COMMITMENT ON PLEA OF GUILTY WHERE DEFENDANT IS REPRESENTED BY ATTORNEY OF HIS OWN CHOICE

STATE OF MISSOURI,)
) ss.
COUNTY OF BARRY)

IN THE CIRCUIT COURT WITHIN AND FOR SAID COUNTY BE IT REMEMBERED that heretofore, to-wit, on the 10th day of January, A.D. 1984, at the regular November term of the Circuit Court begun and held at the court house in the City of Cassville, in the county and state aforesaid, before the Honorable W. H. Pinnell, Judge of said court, the following, among other proceedings, were had and appear of record, to-wit:

STATE OF MISSOURI, Plaintiff,	)	
vs.	)	No. C-___.
DAVID CHITWOOD, a/k/a Gary Hall, a/k/a David Hall Defendant.	)	

Upon an information charging the Defendant with Burglary 2nd Degree – Persistant [sic] Offender

Now on this 10th day of January, 1984, comes the State of Missouri by the prosecuting attorney and comes also the defendant in proper person and by Carr Woods his attorney of record, which attorney has been selected

by the defendant of his own choice and not appointed by the court.

And now the defendant being duly arraigned, waives the reading of the information and enters his voluntary pleas [sic] of guilty to the charge therein contained the nature of said charge and the range of punishment therefor having been fully explained to the defendant. And the court states to the defendant that he has voluntarily entered his plea of guilty to the said charge of Burglary 2nd Degree – Persistant [sic] offender, a felony, and now asks the defendant if he has any legal reason to give why judgment should not be pronounced upon him in accordance with his plea of guilty and the defendant says nothing.

And the court thereupon fixes the punishment of the defendant at imprisonment in an institution to be designated by the Department of Corrections of the State of Missouri in accordance with law for a term of 7 years and pronounces sentence in accordance therewith.

WHEREFORE, it is by the court considered, ordered, adjudged and decreed that the said defendant *shall* be confined in the custody of the Department of Corrections of the State of Missouri in an institution or institutions designated by said department in accordance with law for a period of 7 years to commence on the 10th day of January, 1984, (the court expressly ordering that the time spent by the defendant in jail awaiting trial and prior to his conviction *shall* be calculated as a part of the term of the sentence imposed upon him in accordance with

Section 546.615 RSMo 1949)[1] and that the State of Missouri have and recover of the defendant its costs herein expended and that execution issue thereof, and the defendant is remanded to the custody of the sheriff, to be by him delivered to the reception center of the Department of Correction[s] and a certified copy of this judgment is to be delivered by said sheriff to the Division of Classification and Assignment of the Department of Correction[s] in accordance with law. And the said Department of Correction[s] shall receive and safely keep the said defendant until the judgment of the court herein be complied with or the said defendant shall be otherwise discharged in accordance with law. This sentence will run concurrently with the remainder of a sentence impose[d] against Defendant in the State of Oklahoma County, Oklahoma, Case No. CRF82-2928, which sentence has not been completed.

---

[1] Unless the court has specifically ordered that the Defendant should receive credit for his jail time while awaiting the disposition of his case, the clause enclosed in parentheses should be stricken out.

EXHIBIT B

GARRETT AND WOODS
LAWYERS
FIRST NATIONAL BANK BUILDING
MONETT, MISSOURI 65708
November 3, 1983

MICHAEL D. GARRET
CARR L. WOODS

P.O. BOX 476
TELEPHONE 334-7967
AREA CODE 417

Mr. Duane Hall
Boone County Jail
8th and Ash Streets
Columbia, MO 65201

Re: State of Missouri Hall – Barry County, Missouri

Dear Mr. Hall:

Please find enclosed photocopies of the various Motions which we will be filing on your behalf. As I advised you, I will wait until a few days prior to the 30 day period running from the time of your arraignment so that this will give you additional time.

As far as the Motion For Change Of Venue And Change Of Judge, as long as it is filed within the 30 day period of time, we do not need to state anything other than we would like to have a change of venue and change of Judge and it must be automatically granted under those circumstances. We do not have to allege any prejudice.

I have prepared the Motion in regard to the disqualification of the Prosecuting Attorney[,] but I am sure that will be overruled by the Court.

The Motion To Suppress Statements is drafted in a general form[,] and it will not be necessary to specifically

[Exhibit B – Continued]

allege items as the general Motion will cover those specific areas which you mentioned in your letter.

In conclusion, please be advised that the Prosecuting Attorney has offered to recommend seven (7) years on a plea on one of the charges, will dismiss the remaining charge, and will recommend that that 7 year term run concurrently with any time that you will be serving in the State of Oklahoma.

I will look forward to hearing from you in regard to this matter.

EXHIBIT C

In the District Court of the Seventh Judicial District
of the State of Oklahoma,
Sitting in and for Oklahoma County, Oklahoma.

THE STATE OF OKLAHOMA,)
Plaintiff,)
-vs.-) No. _____
_____,)
Defendant.)

JUDGMENT AND SENTENCE ON PLEA OF GUILTY

Now, on this 2nd day of AUGUST, 1982, the same being a juridical of said court, and the time duly appointed for judgment in the above-entitled cause, and said cause coming on for judgment, and the defendant DAVID L. CHITWOOD being personally present in open court, and being duly represented at all appearances before the court by his attorney of record, JAMES T. ROWAN, and having been legally charged with the offense of FORGERY IN THE SECOND DEGREE and having been duly informed of the nature of the charge and having been duly arraigned thereon, and having duly and properly entered his plea of guilty to the crime of FORGERY IN THE SECOND DEGREE after having been duly advised of his rights and the effect of such plea, and the defendant having been asked by the court whether ___ he has any legal cause to show why judgment and sentence should not be pronounced against him and – he [sic] stating no sufficient cause why judgment and sentence should not be pronounced against the defendant, and none appearing to the court, it is the judgment of the

[Exhibit C – Continued]

court that said defendant is guilty of the crime of FORGERY IN THE SECOND DEGREE.

It is Therefore, Ordered, Adjudged and Decreed by the Court that DAVID L. CHITWOOD is sentenced to a term of FIVE (5) years under the direction and control of the Department of Corrections of the State of Oklahoma; and said defendant is committed to the said Department of Corrections at the Lexington Assessment and Receiving Center at Lexington, Oklahoma, pursuant to the Oklahoma Corrections Act of 1967 and pursuant to the rules of said Department, for the crime of FORGERY IN THE SECOND DECREE, said term of sentence to begin at and from the delivery of the defendant to the Warden of the Center at Lexington, Oklahoma; and that said defendant illegible his right of appeal.

It is Further Ordered, Adjudged and Decreed by the court that the Sheriff of Oklahoma County, Oklahoma, transport said defendant to the said Center at Lexington, Oklahoma, and that the Warden of said Center detain the said defendant according to this judgment, sentence and order, and that the clerk of this court, do immediately certify, under the seal of the court, and deliver to the Sheriff of Oklahoma County, Oklahoma, two copies of this judgment, sentence and order one of the copies to accompany the body of the said defendant to said Center at Lexington, Oklahoma, and to be left therewith at the said Center, said copy to be warrant and authority for the imprisonment of the said defendant and the other copy to be warrant and authority of said Sheriff of Oklahoma

[Exhibit C – Continued]

County, Oklahoma, for the transportation and imprisonment of the said defendant as herein before provided. Said last named copy to be returned to the Clerk of said Court with the proceedings thereunder endorsed thereon.

(COURT COST TO BE PAID WITHIN 6 illegible AFTER RELEASE FROM THE PENITENTIARY.)

Attest:
DAN GRAY,
/s/ Dan Gray
Dan Gray, Court Clerk
By /s/ Illegible
Deputy Court Clerk

/s/ David M. Cook
DAVID M. COOK,
District Judge

(VICTIM COMPENSATION FUND IN THE AMOUNT OF $20.00 TO BE PAID ON OR BEFORE 1st DAY OF THE 2nd MONTH AFTER RELEASE FROM THE PENITENTIARY.)

EXHIBIT E

CERTIFIED COPY OF SENTENCE AND JUDGMENT OF COURT

STATE OF MISSOURI, County of Boone. In the Circuit Court JANUARY Term, 1984.

Be it Remembered, That on this the 14th day of FEBRUARY, 1984, at the regular JANUARY Term of the Boone County Circuit Court begun and held at the Courthouse in the City of Columbia, in the County and State aforesaid, before the HONORABLE FRANK CONLEY Judge of the Thirteenth Judicial Circuit of the State of Missouri and Judge of this Court, Division II, the following among other proceedings were had, to-wit:

THE STATE OF MISSOURI,	)	CRIMINAL
Plaintiff,	)	ACTION
	)	SENTENCE AND
No. 13SEP83 106946 v.	)	JUDGMENT
DAVID LAVERNE CHITWOOD,	)	INFORMATION:
	)	CT. I FORGERY
Defendant	)	CT. II FORGERY

Now on this 14th day of February, 1984, the State of Missouri appears by JEROME ANTEL, ASSISTANT PROSECUTING ATTORNEY. Defendant appears in person and by counsel, JEWELL GIBSON, ASSISTANT PUBLIC DEFENDER Whereupon, defendant withdraws his plea of not guilty or waives formal arraignment and enters plea of guilty. Court finds that defendant has knowingly, intelligently, and voluntarily entered plea of guilty with understanding of nature of charges and range of punishment and that defendant has had effective

[Exhibit E – Continued]

assistance of counsel. Pre-sentence investigation is waived in open court on Ct. I & 3 years on Ct. II.

Defendant's punishment is fixed at three (3) years in the Division of Corrections of the State of Missouri, said sentence to be served concurrently. Said sentence to be served consecutively with sentence heretofore imposed in Berry County, Mo. Case CR282-820FX and in State of Oklahoma Case CRF-32-2928. Said defendant being now asked by the Court if he has any legal cause to show why judgment should not be pronounced against him, according to law, fails to show such cause.

IT IS THEREFORE SENTENCED, ORDERED AND ADJUDGED by the Court, that the defendant, DAVID LAVERNE CHITWOOD, having entered plea of guilty to the above stated charge(s) of CT. I FORGERY AND CT. II FORGERY, be confined in an institution to be designated by the Division of Corrections for the period of THREE (3) years with said sentence to run concurrently but consecutively to sentences heretofore imposed from Berry County, Mo. Case CR282-820FX & State of Oklahoma, Case CRF 82-2928 and that the Sheriff of Boone County shall, without delay, remove and safely convey the defendant to the Division of Correct [sic] there to be kept, confined and treated in the manner directed by law; and the Division of Corrections is required to receive and safely keep him/her, the said defendant, within the division aforesaid until the judgment and sentence of the Court herein be complied with, or until said defendant shall be otherwise discharged by due course of law. The

[Exhibit E – Continued]

Sheriff is authorized one deputy to assist in the delivery of defendant to the Division of Corrections.

Judgment in the sum of $26.00 is entered against defendant and in favor of the Crime Victims' Compensation Fund.

Reporter is to prepare transcript of proceedings of this date and file same within 30 days pursuant to Rule 24.03.

Court finds defendant is not entitled to any pre trial jail time.

EXHIBIT D

Oklahoma
Department of Corrections

3400 MARTIN LUTHER KING AVE.
P.O. BOX 11400
OKLAHOMA CITY, OKLAHOMA 73136
(405) 427-6511

LARRY R. MEACHUM
DIRECTOR

GARY A. PARSONS
Deputy Director
Institutions, Division II

JOHN GRIDER
ASSOCIATE DIRECTOR
Institutions, Division I

JON TILLINGHAST, M.D.
Medical Director

CLIFF SANDEL
Deputy Director
Administrative Services

LINDA GREEN
Deputy Director
Production and Parole

JON R. CAMERON
Deputy Director
Community Corrections

R. MICHAEL CODY
Deputy Director
Programs and Service

TOM LOVELACE
Chief of Security
Internal Affairs

November 6, 1986

David Chitwood, #149019
P.O. Box 900
Jefferson City, Missouri 65102

Dear Mr. Chitwood:

Reference is made to your letter to Director Meachum requesting assistance in returning to Oklahoma for completion of the remainder of the sentence from which you escaped in 1983.

You enclosed a copy of a Missouri Judgement [sic] and Sentence indicating that on January 10, 1984, you were sentenced to a seven year sentence to run concurrently with the remainder of your Oklahoma sentence.

[Exhibit D – Continued]

(*)*Apparently you realize that your Oklahoma sentence will not resume until you are back in Oklahoma custody.* The Oklahoma Department of Corrections is willing to return you to Oklahoma for completion of your incarceration, if Missouri is willing to release you to our custody.

You need to pursue this matter with Missouri authorities. *If Missouri desires to release you to our custody, we will make arrangements to transfer you to Oklahoma.* Our Coordinator of Sentence Administration *has written a letter to the records manager at your facility informing him that we would take custody and offering instructions in making the arrangements* (copy enclosed).

I hope that this information and the letter to your facility records manager leads to the resolution of this matter.

If you require additional assistance, please write to Leon Preston, Coordinator, Sentence Administration and Offender Records, 3400 North Martin Luther King Avenue, Oklahoma City, Oklahoma 73111.

[SEAL]

Sincerely,

/s/ R. Michael Cody
R. Michael Cody, Deputy Director
Division of Programs and Services
863852
"AN EQUAL OPPORTUNITY EMPLOYER"

EXHIBIT G

Oklahoma
Department of Corrections

3400 MARTIN LUTHER KING AVE.
P.O. BOX 11400
OKLAHOMA CITY, OKLAHOMA 73136
(405) 427-6511

LARRY R. MEACHUM
DIRECTOR

JOHN GRIDER
ASSOCIATE DIRECTOR
Institutions, Division I

CLIFF SANDEL
Deputy Director
Administrative Services

JON R. CAMERON
Deputy Director
Community Corrections

GARY A. PARSONS
Deputy Director
Institutions, Division II

JON TILLINGHAST, M.D.
Medical Director

LINDA GREEN
Deputy Director
Production and Parole

R. MICHAEL CODY
Deputy Director
Programs and Service

TOM LOVELACE
Chief of Security
Internal Affairs

November 6, 1986

Records Manager
Missouri State Penitentiary
P.O. Box 900
Jefferson City, Missouri 65102

SUBJ: David Chitwood, MDOC #149019; ODOC #123436

Dear Sir:

Inmate Chitwood has written to the Oklahoma Department of Corrections requesting transfer back to our custody.

He escaped from our Ouachita Correctional Center during 1983 and has subsequently been sentenced and incarcerated in Missouri. He enclosed a copy of a Judgement

[Exhibit G – Continued]

[sic] and Sentence rendered January 10, 1984, by Barry County, CR-283-820-FX, seven years. This Judgement [sic] and Sentence indicates it is to run concurrent to the remainder of his Oklahoma sentence, Oklahoma County CRF-82-2928.

Please be advised that the Oklahoma Department of Corrections is willing to transfer him back to our custody. If Missouri is willing to release him to our custody, please have him sign a Waiver of Extradition and teletype our security unit. Our teletype OR is OK055025C. Upon receipt of your teletype, we would make arrangements to assume custody within a few days.

If you have questions or need additional information, please contact me in writing or call (405) 427-6511, ext. 442.

Thank you for your assistance in this matter of mutual concern.

[SEAL]

Sincerely,

/s/ Leon Preston
Leon Preston, Coordinator
Offender Records and
Sentence Administration

863852
"AN EQUAL OPPORTUNITY EMPLOYER"

EXHIBIT H

DETAINER

Date 30 October 1984

Associate Warden of Custody:

cc: Control Center, Parole Office, Classification, Central Clothing, Classification & Assignment, Our File, Inmate.

SUBJ: David CHITWOOD #149019
Charge; Owes 3 yrs. 11 mths. 23 days on OK sentence

A detainer has been placed against the above named inmate in favor of Oklahoma Dept. of Corrections Bodgen, Oklahoma[,] as of this date.

/s/ Illegible
Records Office

EXHIBIT I

Jan. 30, 1989

Dear Mr. Faut,

I am needing clarification & information concerning my committment [sic] papers. When sentenced in Barry County[,] my present 7 year sentence was run concurrently with a 5 yr sentence in Oklahoma. The Oklahoma sentence was imposed on August 2, 1982. With accredited jail time (44 days) and all this means that to date I should have approximately 19 months served towards this 7 years sentence.

Therefore[,] I would appreciate knowing if this information is correctly reflected by the file records, and also I would like to know both my 7/12ths conditional release date and my 12/12ths commutation date.

[SEAL]

EXHIBIT J

STATE OF MISSOURI
DEPARTMENT OF CORRECTIONS
AND HUMAN RESOURCES
DIVISION OF ADULT INSTITUTIONS

P.O. BOX 236
JEFFERSON CITY, MISSOURI 65102

PHONE: 314-751-2389

JOHN ASHCROFT
GOVERNOR

DICK D. MOORE
DIRECTOR

GEORGE A. LOMBARDI
DIRECTOR
DIVISION OF ADULT INSTITUTIONS

October 20, 1986

David Chitwood #1490019
Housing Unit 5A, 75
M.S.P.

Chitwood:

I am in receipt of your recent letter regarding your Oklahoma sentence. I am referring your letter to Mr. Harry Lauf, Records Officer, at the Missouri State Penitentiary for response as this office is unable to assist you.

If you have any further questions, you should contact Mr. Lauf at your institution.

Sincerely,

/s/ Carol J. Wolkey
CAROL J. WOLKEY,
Interstate Compact
Coordinator.

cc: Harry Lauf, MSP Records
File.

EXHIBIT I

I would greatly appreciate you[r] forwarding this to me as quickly as possible so that if there is any error[,] that I might begin legal pursuit to correct such.

I thank you for your time & cooperation.

Respectfully yours,

David Chitwood 149019
H. Hall Cell #54

Find attached a copy of your judgment which only states it is to run concurrently with the remainder of your Oklahoma sentence.

Love